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May 22 1987	Application for extension of time to file petition and order granting same until July 13, 1987 (Scalia, May 26, 1987).
Jul 13 1987	Petition for writ of certiorari filed.
Jul 24 1987	Order extending time to file response to petition until August 31, 1987.
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Oct 19 1987	Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Marshall. Opinion per curiam.

****

PETITION FOR WRIT OF CERTIORARI

87-75

No.

Supreme Court, U.S.
FILED
JUL 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF ARTHUR H. MCCOY, DECEASED,
ROBERT MCCOY, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals exceeded its authority in granting a taxpayer's request to forgive interest on a tax deficiency, and to forgive a statutory late-payment penalty, "in order to achieve a fair and just result."

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF ARTHUR H. MCCOY, DECEASED,
ROBERT MCCOY, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the March 2, 1987, order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals forgiving the interest and penalty (App., *infra,* 1a-2a) is unreported. The opinion of the court of appeals sustaining the tax deficiency (App., *infra,* 3a-15a) is reported at 809 F.2d 333. The opinion of the Tax Court (App., *infra,* 19a-27a) is unofficially reported at 50 T.C.M. (CCH) 1194, and the decision of the Tax Court (App., *infra,* 28a) is unreported.

JURISDICTION

The judgment of the court of appeals sustaining the tax deficiency (App., *infra,* 16a-17a) was entered on January 23, 1987. The order of the court of appeals forgiving the interest and penalty (App., *infra,* 1a-2a) was entered on March 2, 1987. On May 26, 1987, Justice Scalia extended

the time for filing a petition for writ of certiorari to and including July 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 6601, 6651, and 7482 of the Internal Revenue Code (26 U.S.C.) are as follows:

SEC. 6601. Interest on underpayment, nonpayment, or extensions of time for payment, of tax

(a) General rule

If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at an annual rate established under section 6621 shall be paid for the period from such last date to the date paid.

* * * * *

SEC. 6651. Failure to file tax return or to pay tax

(a) Addition to the tax

In case of failure–

* * * * *

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 10 days of the date of the notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure

is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * * *

SEC. 7482. Courts of review

(a) Jurisdiction

The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) Powers

(1) To affirm, modify, or reverse

Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

* * * * *

STATEMENT

1. Arthur H. McCoy died testate on April 23, 1980, and respondent Robert McCoy was appointed executor of his estate. The decedent at the time of his death owned an undivided one-half interest in land used for his family

farm, which had a fair market value of $235,140. Section 2032A of the Internal Revenue Code[1] allows an estate to elect a special method for valuing certain real property, including farm property, for estate tax purposes. This method generally produces a lower valuation and hence a lower estate tax. At the time relevant here, this election was available only if the land was "qualified real property" and only if the election was made "not later than the time prescribed by Section 6075(a) for filing the [estate tax] return * * * (including extensions thereof) * * *." 26 U.S.C. (1976 ed.) 2032A(b) and (d)(1). Since an estate tax return under Section 6075(a) must be filed within nine months of the decedent's death, and since respondent did not obtain an extension of time to file that return, respondent was required to make an election under Section 2032A, if he desired to make one, no later than January 23, 1981. App., *infra*, 4a, 20a.

It is undisputed that the decedent's farmland was "qualified real property" as that term was defined in 1980. Respondent, however, did not file an estate tax return electing to value that property under Section 2032A until February 11, 1981—19 days after the election was required to be made. App., *infra*, 4a, 20a. The election was therefore untimely. The Commissioner accordingly concluded that the farmland had to be valued for estate tax purposes at its fair market value ($235,140), and not at the lower figure ($103,305) that respondent had reported in reliance on Section 2032A. App., *infra*, 20a. Based on that conclusion, the Commissioner determined a deficiency in estate tax in the amount of $22,159.72. No additions to tax were imposed at that time. App., *infra*, 19a-20a.

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

Respondent sought redetermination of the deficiency in the Tax Court. Respondent conceded that his election was untimely—and therefore ineffective—under the law in existence at the time of the decedent's death. See App., *infra*, 21a. But respondent contended that the time for making the Section 2032A election had been extended retroactively by the effective-date provisions of the amendments to Section 2032A contained in the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, § 421(k)(5), 95 Stat. 314.

The Tax Court rejected this contention and sustained the deficiency determined by the Commissioner. The court held that the relevant ERTA provisions afforded an additional period to make the Section 2032A election only to estates that had been ineligible to elect the benefits of that section prior to ERTA's enactment. The court ruled that Congress had not intended to confer a windfall on estates, like the instant estate, that were previously eligible for Section 2032A benefits, but which had not qualified for these benefits because their executors simply had failed to make a timely election (App., *infra*, 24a-27a).

The court of appeals unanimously affirmed (App., *infra*, 3a-15a). Although it suggested that the original language of ERTA lent support to respondent's position (see *id.* at 6a-11a), it concluded that the Technical Corrections Act of 1982, Pub. L. No. 97-488, 96 Stat. 2365, which amended ERTA retroactively in order to clarify the relevant effective-date provisions, made clear that Congress did not intend the ERTA provisions to benefit previously eligible estates (App., *infra*, 11a-14a). Accordingly, the court held that respondent's election was untimely and ineffective, as respondent conceded it was under pre-ERTA law.

2. After the Tax Court's decision, respondent failed to file the appeal bond required by Section 7485 of the Code to stay assessment and collection of the deficiency that the

Tax Court had determined. While the appeal was pending in the Sixth Circuit, therefore, the Commissioner duly assessed the deficiency and later issued a notice and demand for payment of the tax. See I.R.C. §§ 6201, 6213(a), 7485(a) and 6303. When respondent did not pay the deficiency within 10 days of notice and demand, an addition to tax under Section 6651(a)(3) thereupon accrued. That section provides that, if a taxpayer fails to pay a tax within 10 days of notice and demand therefor, there shall be added to the tax an amount equal to 0.5% of the tax (but not exceeding 25% in the aggregate) for each month that the failure continues, unless the taxpayer shows that his failure was "due to reasonable cause and not due to willful neglect."

Shortly after the Sixth Circuit issued its judgment sustaining the tax deficiency, respondent filed, on February 7, 1987, a petition asking that court to "forgive" the interest that had accrued on the deficiency, as well as the Section 6651(a)(3) late-payment penalty. Respondent stated that the total amount of delinquent estate tax, interest, and penalty then exceeded $50,000. Respondent asserted that it would be inequitable to require the estate to pay the interest and the penalty in view of the fact that it had litigated in good faith the validity of its Section 2032A election.

On March 2, 1987, the court of appeals entered an order granting respondent's petition, without requesting a response from the government (App., *infra*, 1a-2a).[2] The court asserted that "interest and penalty should be forgiven in this case in order to achieve a fair and just result." The court therefore "ordered that the [Commissioner] collect only the tax assessed against [respondent] and that all interest, penalties and other late charges are forgiven." *Ibid.*

[2] The government treated respondent's post-judgment petition for forgiveness of interest and penalty as a petition for rehearing, which is not to be responded to absent a request by the court. See Fed. R. App. P. 40. On March 16, 1987, the government filed a timely petition for rehearing of the court's March 2 order, together with a motion to recall the mandate, pointing out that the court's order exceeded its authority. On April 14, 1987, the court denied the motion to recall the mandate (App., *infra*, 18a), and the clerk subsequently informed the government that this denial should be treated as a denial of the government's petition for rehearing. Out of an abundance of caution, we have computed the time for filing this petition from March 2, 1987, the date of the order sought to be reviewed; Justice Scalia subsequently extended the time for filing the petition to and including July 13, 1987.

REASONS FOR GRANTING THE PETITION

The court of appeals' order is made of whole cloth; it has no basis whatever in law. To begin with, the questions of respondent's liability for interest and the late-payment penalty were beyond the scope of the Tax Court decision being reviewed by the court of appeals. Those questions, therefore, were outside the appellate court's jurisdiction. Apart from this jurisdictional defect, the court of appeals' ruling is insupportable on the merits. It was issued in defiance of the statutes that Congress has enacted, it conflicts with decisions of other appellate courts, and it seriously undermines settled principles of tax litigation. Such an arrogation of judicial power should not be countenanced by this Court.

1. Section 7482(a) of the Code grants the courts of appeals jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Section 7482(c), entitled "Powers," states that the courts of appeals "shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court." In reviewing a Tax Court decision, therefore, the duty of the court of appeals is to consider whether the Tax Court committed error. See generally *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175

(1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a case already instituted, and does not create that cause."). A court of appeals plainly lacks jurisdiction to decide issues that were not the subject of the Tax Court proceeding or to grant relief that would be beyond the powers of the Tax Court itself. See, *e.g.*, *Taylor* v. *Commissioner*, 258 F.2d 89, 93 (2d Cir. 1958); *Vandenberge* v. *Commissioner*, 147 F.2d 167, 168 (5th Cir.), cert. denied, 325 U.S. 875 (1945); cf. *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943) (recognizing limited jurisdiction of Board of Tax Appeals).[3]

The court of appeals violated its jurisdictional bounds in this case. Its jurisdiction was "to review the decision[] of the Tax Court" (I.R.C. § 7482(a)), and the decision of the Tax Court was that "there is a deficiency in the amount of $22,159.72 in [respondent's] Federal estate tax" (App., *infra*, 28a). Because the court of appeals ruled that this decision was correct, the court should have done no more than affirm it. Instead, the Sixth Circuit went on to decide new questions relating to interest and penalty—questions that were not presented, and could not possibly have been presented, to the Tax Court—and to grant relief that the Tax Court itself would have had no jurisdiction to provide.

The Tax Court itself could not have entertained a request by respondent to "forgive" interest on the estate tax deficiency. Interest on tax deficiencies is mandated by statute (I.R.C. § 6601(a)), and it is well established that

[3] There is of course no jurisdictional bar to a court of appeals' consideration of *arguments* not advanced in the Tax Court, although appellate courts are usually reluctant to entertain such arguments for prudential reasons. See *Hormel* v. *Helvering*, 312 U.S. 552 (1941). But such arguments, if entertained, must relate to an issue that was actually the subject of the Tax Court proceeding and that affects the correctness of the Tax Court decision being reviewed.

the Tax Court, as a court of limited jurisdiction, lacks general equitable powers. *Commissioner* v. *Gooch, supra*; *Continental Equities, Inc.* v. *Commissioner*, 551 F.2d 74 (5th Cir. 1977); *Morse* v. *United States*, 494 F.2d 876 (9th Cir. 1974); *Schwartz* v. *Commissioner*, 40 T.C. 191, 193-194 (1963). Indeed, the Tax Court does not have jurisdiction even to determine the correct amount of interest to be imposed on a deficiency. See, *e.g.*, *Commissioner* v. *Kilpatrick's Estate*, 140 F.2d 887 (6th Cir. 1944); *Estate of Baumgardner* v. *Commissioner*, 85 T.C. 445, 452 (1985); *Chapman* v. *Commissioner*, 14 T.C. 943, 946-947 (1950), aff'd, 191 F.2d 816 (9th Cir. 1951), cert. denied, 343 U.S. 905 (1952). It is for that reason that the Tax Court's "decision" is limited to "an order specifying the amount of the deficiency." I.R.C. § 7459(c); T.C. Rule 155; App., *infra*, 28a. The Tax Court's decision makes no reference to interest, which is computed subsequently and independently by the Commissioner.

The Section 6651(a)(3) penalty was also outside the scope of the appeal. That "addition to the tax" is imposed when a taxpayer fails to pay a tax "within 10 days of the date of notice and demand therefor." "Notice and demand" for a tax cannot be made until the tax has been assessed (I.R.C. § 6303), and the deficiency here was not assessed, and could not have been assessed, until after the Tax Court had entered its decision (I.R.C. § 6213(a)). In the instant case, therefore, there was not even an *occasion* for imposition of a Section 6651(a)(3) penalty until after the Tax Court's decision had been rendered. It is thus obvious that no challenge to that penalty could have been mounted in the Tax Court, and that no reference to that penalty could have been made in the Tax Court decision under review here by the court of appeals.[4]

[4] Section 7485 of the Code provides that the assessment and collection of a deficiency determined by the Tax Court may be stayed while

The fact that the interest and late-payment penalty could not have been challenged in the Tax Court does not mean that the estate was without an opportunity to litigate the validity of those items. The proper procedure would have been for respondent to have paid the statutorily-imposed interest and penalty and then sued for a refund in the district court or the Claims Court. The Sixth Circuit in the former case, and the Federal Circuit in the latter, would then have had jurisdiction to consider those issues on appeal from a judgment of the appropriate trial court. But the Sixth Circuit's undertaking to "forgive" the interest and the penalty, in the course of reviewing a Tax Court decision that did not address and could not have addressed those questions, quite plainly exceeded its jurisdiction.

Indeed, besides transgressing general principles of appellate jurisdiction, the Sixth Circuit's order violates the specific mandate of Section 7421(a) of the Code, generally known as the "Anti-Injunction Act." That statute provides, with exceptions not relevant here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The purpose of this provision is to allow the United States to assess and collect its taxes without judicial intervention, and to channel disputes over the correctness of such assessments and collection to the forums designated for refund suits. See, *e.g.*, *Bob Jones University* v. *Simon*, 416

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the taxpayer appeals the Tax Court decision, but "only if the taxpayer * * * has filed with the Tax Court a bond" to ensure payment. I.R.C. § 7485(a)(1); T.C. Rule 192. Thus, respondent could have avoided the requirement of immediate payment of the deficiency following the Tax Court's decision and, by the same token, could have avoided imposition of the penalty that arose when the estate neglected to make timely payment. Respondent, however, failed to post the requisite appeal bond.

U.S. 725, 736 (1974); *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). In particular, the Anti-Injunction Act prohibits injunctive relief with respect to the collection of interest on taxes (*Transport Mfg. & Equipment Co.* v. *Trainor*, 382 F.2d 793, 797 n.8 (8th Cir. 1967)) and with respect to collection of additions to tax imposed under Section 6651 (*Professional Engineers, Inc.* v. *United States*, 527 F.2d 597 (4th Cir. 1975); *Shaw* v. *United States*, 331 F.2d 493, 496 (9th Cir. 1964)). The Sixth Circuit here, by "order[ing] that the [Commissioner] collect only the tax assessed" to the exclusion of interest and penalty (App., *infra*, 2a), has restrained the Commissioner from collecting those latter sums. The court thus violated the limitation on judicial power set forth in Section 7421.[3]

2. Quite apart from its jurisdictional defects, the court of appeals' order forgiving the interest and the penalty is insupportable on the merits. Section 6601 of the Code provides that, "[i]f any amount of tax imposed by this title * * * is not paid on or before the last date prescribed for payment, interest on such amount at the annual rate established under Section 6621 *shall be paid* for the period from such last date to the date paid" (emphasis added). The interest mandated by Section 6601 is not a sanction for late payment; rather, it represents compensation to the government for interest foregone due to the taxpayer's delay in payment. See, *e.g.*, *United States* v. *Childs*, 266 U.S. 304,

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[3] There is an extremely limited exception to the prohibition of the Anti-Injunction Act, namely, where the taxpayer has no adequate remedy at law and "it is clear that under no circumstances could the Government ultimately prevail." *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. at 6-7. That exception obviously has no application here, since respondent could have raised its contentions about the interest and the penalty in a subsequent refund suit, and since respondent's contentions about the interest and the penalty are in any event incorrect, as we demonstrate below.

309-310 (1924). The interest requirement is absolute; the statute contains no provision for judicial waiver of the interest requirement in order to achieve what the court of appeals described as "a fair and just result" (App., *infra,* 1a).

Accordingly, the courts of appeals have uniformly rejected the idea that a taxpayer can be relieved of his obligation to pay interest on a tax deficiency because of supposed equitable considerations. The Ninth Circuit has simply noted that the language of the statute is unequivocal. *Grauvogel* v. *Commissioner,* 768 F.2d 1087, 1090 (1985). The Tenth Circuit has pointed out that the purpose of the interest provision is to compensate the government for delay in payment, not to penalize the taxpayer; it accordingly has concluded that "[a] taxpayer cannot seek redetermination and review of a deficiency in tax, enjoy the delay, and when unsuccessful be heard to say that interest should not be exacted." *Owens* v. *Commissioner,* 125 F.2d 210, 213 (1942). And the Sixth Circuit itself, in reversing a district court order that had abated interest after one year because of court delays, has stated that such an order is "beyond the court's equitable powers * * * [and] plainly erroneous." *Johnson* v. *United States,* 602 F.2d 734, 739 (1979); see also *United States* v. *Means,* 621 F.2d 236, 238 (6th Cir. 1980).

The court of appeals' action in forgiving the late-payment penalty was equally erroneous. Whereas Section 6601 makes the imposition of interest unconditional, Section 6651(a)(3) does excuse a taxpayer from the late-payment penalty if he shows that his failure to pay the tax on time was "due to reasonable cause and not due to willful neglect." But the court of appeals did not rest its order on any such finding. Indeed, it could scarcely have done so, since the existence of "reasonable cause" entails a question of fact (see *United States* v. *Boyle,* 469 U.S. 241, 249 n.8 (1985)); that factual question was not considered

and could not have been considered by the Tax Court (see page 9, *supra*), and that question could not have been decided in the first instance by the court of appeals.[6]

If respondent wished to contest his liability for the late-payment penalty, his proper course was to pay it and then file a refund suit. In that case, the appropriate trial court would have determined whether his failure to make timely payment was excusable for "reasonable cause," and the appropriate court of appeals could have been asked to review that finding. But the Sixth Circuit here had absolutely no authority—with or without the benefit of factual findings below—to forgive the penalty "in order to achieve a fair and just result" (App., *infra,* 1a).

3. The decision of the court of appeals evades the clear mandate of two statutory provisions that arise almost daily in federal tax litigation. In enacting Section 6601, Congress has determined that a taxpayer who wishes to halt the accrual of interest must pay the deficiency while pursuing his claims in court. The decision below effectively grants taxpayers an interest-free loan while they are pur-

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[6] The court of appeals, in its order forgiving the late-payment penalty, recited respondent's allegation (App., *infra,* 1a) that he had "reasonably relied" on the retroactive ERTA effective-date provision in litigating the validity of the estate's Section 2032A election. Whatever the truth of that allegation, it was wholly irrelevant to the question of respondent's liability for the late-*payment* penalty. That penalty was imposed, not because respondent was negligent in maintaining his legal position (compare I.R.C. § 6653(a) (providing for a negligence penalty)), but because respondent failed to *pay* the tax after it had been properly assessed. The Code permits a taxpayer to postpone assessment while he litigates his position on appeal, but it requires him to post an appeal bond in order to do so (I.R.C. § 7485(a)). When respondent failed to post an appeal bond, the tax was assessed and payment became due. See note 4, *supra*. In determining whether respondent had "reasonable cause" within the meaning of Section 6651(a)(3) for failure to pay at that point, the reasonableness of the legal theory that prompted him to initiate the litigation was completely immaterial.

suing their claims in court, thus imposing on the government the cost of delay occasioned by unsuccessful taxpayer litigation. Similarly, in enacting Section 6651, Congress has created an additional incentive for taxpayers to pay their taxes promptly, providing for the exaction of a modest penalty where a late payment is not due to "reasonable cause." The decision below reads those words out of the statute, holding that the penalty is inapplicable whenever a court chooses to forgive it. These twin rulings, unless reversed, will only encourage taxpayers to pursue wasteful and dilatory litigation and could have a severely deleterious effect on the public fisc.

Moreover, the court issued its decision in a casual, almost offhand, manner. It made no effort to explain its jurisdiction or its result, it ignored conflicting decisions of other appellate courts, and it did not even cite the statutes that it was purporting to construe. Compare *Sumner* v. *Mata*, 449 U.S. 539, 548 (1981). The court issued its unprecedented order without requesting a response from the government, and, when presented with a petition for rehearing from the government, evidently chose to ignore that document rather than address the arguments in it.

The court of appeals' order is unpublished, and we do not often seek certiorari from unpublished orders, erroneous though they often seem to us. The Sixth Circuit's action here, however, is not the only example of its seeming willingness to ignore the language of tax statutes in a misguided effort to do equity. See *Asphalt Products Co.* v. *Commissioner*, 796 F.2d 843 (1986) (construing Section 6653(a) negligence penalty), rev'd per curiam, No. 86-1053 (June 1, 1987). And we do not think that a court should be permitted to ignore Acts of Congress, whether or not it chooses to publish its decision.

CONCLUSION

The petition for a writ of certiorari should be granted, and the March 2, 1987, order of the court of appeals should be summarily reversed.

Respectfully submitted.

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JULY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-1008

ESTATE OF ARTHUR H. MCCOY, DECEASED
ROBERT MCCOY, EXECUTOR, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT- APPELLEE

[Filed Mar. 2, 1987]

ORDER

BEFORE: LIVELY Chief Judge; KEITH and MERRITT, Circuit Judges.

By a decision of this court entered on January 23, 1987 in the above-styled case, we affirmed a decision of the United States Tax Court upholding a tax assessment against the estate of Arthur H. McCoy in the amount of $22,159.72. The estate of Arthur H. McCoy has now petitioned this court to forgive interest on the above assessment because our affirmance was based solely on an after-the-fact amendment of a statutory provision upon which the petitioner reasonably relied. The matter has been in litigation since 1981 and the interest and penalties now exceed the assessed tax.

Upon consideration of the petition and the entire record the court concludes that interest and penalty should be forgiven in this case in order to achieve a fair and just result. Accordingly it is ORDERED that the respondent

collect only the tax assessed against the petitioner and that all interest, penalties and other late charges are forgiven.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
John P. Hehman

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-1008

ESTATE OF ARTHUR H. MCCOY, DECEASED
ROBERT MCCOY, EXECUTOR, PETITIONER-APPELLANT,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT- APPELLEE.

On Appeal from a Decision of
the United States Tax Court.

[Decided and Filed January 23, 1987]

BEFORE: LIVELY, Chief Judge; KEITH and MERRITT, Circuit Judges.

LIVELY, Chief Judge. This case concerns the special valuation treatment accorded "qualified real property" under 26 U.S.C. § 2032A, first enacted in 1976 and amended by section 421 of the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34 (1981). Ordinarily, all property subject to the federal estate tax must be reported at its fair market value as of the date of a decedent's death, 26 U.S.C. § 2031 or an optional valuation date, 26 U.S.C. § 2032. However, under § 2032A a decedent's estate may elect to report real estate that meets the definition of "qualified real property" at a special use valuation, resulting in lower estate taxes. The precise question to be decided is whether a provision of § 421(k)(5) of

ERTA had the effect of validating an otherwise untimely election by the executor of Arthur H. McCoy's estate.

I.

Arthur H. McCoy died on April 23, 1980, the owner of an undivided one-half interest in a family farm of 244 acres in Clinton County, Ohio. McCoy had materially participated in the operation of the farm during the entire time he owned it, and the Commissioner of Internal Revenue (Commissioner) concedes that if the execution [*sic*] of McCoy's estate made a timely election the estate would be entitled to special use valuation. However, the unamended special use provision of the Internal Revenue Code (Code) required that the election be made no later than the date on which the estate tax return was required to be filed, 26 U.S.C. § 2032A(d)(1), *i.e.*, nine months after the date of McCoy's death, 26 U.S.C. § 6075(a). The executor filed an estate tax return on February 11, 1981, nineteen days after it was due. The return included a special use election under which the farmland was valued at $103,304, rather than at its fair market value of $235,139.

The Commissioner did not dispute the correctness of these figures under the two different methods of valuation, but assessed a deficiency based on his determination that the election was untimely. The estate contested this determination in the United States Tax Court, contending that § 421(k)(5) of ERTA established a grace period by which its otherwise untimely election became timely. The Tax Court agreed with the Commissioner and upheld the deficiency in a memorandum opinion filed September 26, 1985. T.C. Memo. 1985-509.

II.

Before its 1981 amendment, the code definition of "qualified real property" provided in relevant part:

> **(b) Qualified real property**
>
> **(1) In general**
>
> For purposes of this section, the term "qualified real property" means real property located in the United States which was acquired from or passed from the decedent to a qualified heir of the decedent and which, on the date of the decedent's death, was being used for a qualified use . . . .

26 U.S.C. § 2032A(b)(1) (Supp. IV 1980). After the amendment this section provided:

> **(b) Qualified real property**
>
> **(1) In general**
>
> For purposes of this section, the term "qualified real property" means real property located in the United States which was acquired from or passed from the decedent to a qualified heir of the decedent and which, on the date of the decedent's death, was being used for a qualified use *by the decedent or a member of the decedent's family* . . . .

(new language in italics) 26 U.S.C. § 2032A(b)(1) (Supp. V 1981). This amendment was contained in § 421(b)(1) of ERTA.

Our decision turns on the construction of § 421(k)(5) of ERTA which provided in relevant part:

> (5) CERTAIN AMENDMENTS MADE RETROACTIVE TO 1976.—(A) IN GENERAL.—The amendments made by subsections (b)(1), (c)(2), (j)(1), and (j)(2) shall apply with respect to the estates of decedents dying after December 31, 1976.
>
> (B) TIMELY ELECTION REQUIRED.—Subparagraph (A) shall only apply in the case of an estate if a timely election under section 2032A

> was made with respect to such estate. If the time for making an election under section 2032A with respect to any estate would have otherwise expired after July 28, 1980, the time for making such election shall not expire before the date 6 months after the date of the enactment of this Act.

ERTA was enacted August 13, 1981. Since the time for making an election for the McCoy estate would "otherwise have expired after July 28, 1980," the executor argues that § 421(k)(5) extended that time to February 13, 1982 (6 months after ERTA became effective). The executor relies on the fact that § 421(k)(5) grants the grace period to "any estate" whose time for making the election would otherwise have expired after July 28, 1980.

The Commissioner's position is equally straightforward. He argues that the purpose of § 421(b)(1) of ERTA was to expand the definition of qualified real property so that a qualified use by a member of the decedent's family, in addition to such use by the decedent himself, would make the estate eligible for a special use valuation. In making § 421(b)(1) retroactive to December 31, 1976 and extending the time for election, according to the Commissioner, Congress merely gave those estates which qualified for the first time under the new definition a reasonable time in which to make the election. It was not the purpose of the amendment, this argument continues, to reopen the election period for an estate that qualified under the older, more restricted definition, but had failed to make a timely election.

III.

The provision for special use valuation was originally added to the Code on the basis of a determination by Congress that it is "inappropriate" to value land actually used

for family farming or other closely held business purposes at its fair market value based on its "highest and best use." Congress noted that levying estate taxes based on the land's potential for development or speculation could cause heirs to sell such land rather than continuing the former use. Deeming it desirable to encourage the continued use of land for farming and other small business purposes, Congress enacted 26 U.S.C. § 2032A. When all the requirements of that section are met, estate taxes on qualifying land are significantly lower than if the land were taxed on its fair market value. H.R. Rep. No. 1380, 94th Cong., 2nd Sess. 21-22 *reprinted in* 1976 U.S. Code Cong. & Admin. News 3356, 3375-76.

In proposing the 1981 amendments to § 2032A the congressional committee gave the following reason for the changes:

> The current use valuation provision has provided extensive relief to numerous family farms and businesses. However, a number of technical requirements of the current use valuation provision have resulted in incomplete relief being received by the owners of many family farms and other businesses for which the committee wished to provide. For these reasons, the committee has provided for a number of changes to the current use valuation provision to assist further in the preservation of family owned and operated farms and other businesses.

S. Rep. No. 97-144, 97th Cong. 1st Sess. at 133, *reprinted in* 1981 U.S. Code Cong. & Admin. News 105, 233. In describing the pre-death qualification requirements, the committee report emphasized the fact that under the proposed amendment the qualified use requirement would be satisfied "if either the decedent or a member of the decedent's family uses real property otherwise eligible for current use valuation as a farm for farming purposes or in another trade or business." *Id.* The provision making the

amendment to § 2032A(b)(1) retroactive and the section providing the six month grace period were not discussed or explained.

The executor contends that the purpose of amending § 2032A(b)(1) was clearly to expand eligibility for favorable tax treatment by liberalizing the definition of "qualified real property." In order to give this expanded eligibility the fullest possible effect, Congress made the new definition retroactive to the time when special use valuation was first made part of the Code. This expansive purpose was also furthered by providing that the time making the election would not expire until six months after enactment of ERTA for *any estate* whose time for making the election would have otherwise expired after July 28, 1980, the date on which the final treasury regulations under § 2032A were adopted.

So far as we can determine, the precise issue presented by this case has not been decided by any court. Although the question of a timely election was not at issue in *Schuneman v. United States,* 783 F.2d 694 (7th Cir. 1986), the court did set forth its view of the effect of the 1981 amendment to the definition of qualifying use. In responding to an argument that retroactive application of the amendment would impose an additional condition on eligibility for special use valuation not present in the 1976 enactment, the court wrote:

> Rather than restricting the eligibility for special use valuation, the 1981 amendment expanded eligibility by allowing the property to be used for a qualified use by either the decedent or a member of her family. Congress made the amendment retroactive so that all estates could benefit from the liberalization of the test.

Id. at 698 n. 2. The reference to "all estates" supports the executor's argument.

The question of a timely election was at issue in *Rath v. United States,* 733 F.2d 594 (8th Cir. 1984), and *Bixler*

v. United States, 616 F. Supp. (N.D.S.D. 1985), both of which involved claims of retroactive qualification for special use valuation under § 421(k)(5)(B) of ERTA. However, the time for making an election in each of those cases had expired *before* July 28, 1980, and thus the taxpayers were outside the express language of § 421(k)(5)(B). Since the time for making an election in the instant case expired after July 28, 1980, as required by ERTA, the McCoy estate has a stronger claim to the retroactive provisions of ERTA than the taxpayers in *Rath* and *Bixler.*

IV.

In construing any statute we look first to the language of the statute itself. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984) (footnote omitted). In enacting § 421(k)(5) Congress made certain provisions of ERTA retroactive. Included in the provisions made retroactive in § 421(k)(5)(A) was the amendment to 26 U.S.C. § 2032A, which defined qualified real property. Section 421(k)(5)(B) limited retroactivity under § 421(k)(5)(A) by making it applicable only to estates that had made a timely election under 26 U.S.C. § 2032A. However, the second sentence of § 421(k)(5)(B) made some elections timely that would not have been timely under § 2032A before amendment. For such estates, whose time for making an election would have otherwise expired after July 28, 1980, a new extended time for making an election was prescribed.

The only restriction on the extended time for making an election was that the time under unamended § 2032A would otherwise have expired after July 28, 1980. Congress could easily have modified the second sentence of

§ 421(k)(5)(B) to limit the six month grace period to those estates that could not have elected special use valuation under unamended § 2032A and that became eligible for such election only by reason of the ERTA amendments. Instead, it used inclusive language, granting this new open season for election to "any estate" whose time for making the election would otherwise have expired after July 28, 1980. Thus, read literally, § 421(k)(5)(B) of ERTA made the McCoy estate's election on February 11, 1981 timely, since the grace period established by ERTA did not expire until February 13, 1981.

Since the clear purpose of the 1981 amendments was to expand eligibility for special use valuation and Congress chose to make the extended time for election applicable to "any estate" satisfying a requirement that was unrelated to the question of previous eligibility, it cannot be assumed that Congress intended to limit this privilege to those estates made eligible for special use valuation in the first instance by one or more of those amendments. Congress placed one explicit limitation on the right to benefit from the extended time for making an election ("would have otherwise expired after July 28, 1980"), and the McCoy estate satisfied that requirement. Under these circumstances we cannot rely on an unexpressed intent of Congress.

If, prior to the ERTA amendments, § 2032A had specified that qualified use by the decedent made an estate eligible for special use valuation, and the only change made by § 421(b)(1) of ERTA had been the addition of "or a member of the decedent's family," the Commissioner's arguments would carry more weight. In that case, the provisions of § 421(k)(5) would have been directly tied to a new feature of the amended statute. But this was not the case. Section 421(b)(1) amended 26 U.S.C. § 2032A by adding "*by the decedent or* a member of the decedent's family" following the words "qualified use." Thus, the

amendment enlarged the definition by describing a use that clearly qualified before the amendment (use by the decedent) as well as a use that qualified for the first time under the amendment (use by a member of the decedent's family). When § 421(k)(5) made the amendment contained in § 421(b)(1) retroactive and extended the time for making an election, it made no distinction between estates that were eligible under unamended § 2032A and those first made eligible by the ERTA amendments.

The Commissioner relies on legislative history consisting of a House report that contained the following sentence:

> Estates for which estate tax returns were due and timely filed before enactment of the bill (ERTA) *which are eligible to reinstate (or make) elections because of these retroactive changes* will be allowed six months from the date of enactment of the bill in which to reinstate current use valuation elections. . . .

H.R. Rep. No 97-201, 97th Cong., 1st Sess. at 179 (emphasis added). This comment does not cover the situation in the present case. It appears to refer to estates that had filed a timely estate tax return, but had not included an election because they were not eligible for a special use valuation under unamended § 2032A, or had made elections that had been rejected by the Commissioner and thus were eligible for reinstatement. The McCoy estate is not covered by the quoted language. It sought to have its election, made on an estate tax return that was untimely under the original § 2032A, treated as timely because of the extension of the time for filing contained in § 421(k)(5)(B).

V.

Our task is complicated by the fact that Congress amended § 421(k)(A)-(B) of ERTA on January 12, 1983

by the Technical Corrections Act of 1982, Pub. L. No. 97-488, 96 Stat. 2365 (1983). Thus we must deal with an amendment to an amendment. The precise changes made to section 421 can be found in the section of the Technical Corrections Act titled: Amendments Related to Section 421, subsection (b)(4)(B), Clarification of Effective Dates. After amendment, section 421(k)(5)(A)-(B) of ERTA read:

> (5) CERTAIN AMENDMENTS MADE RETROACTIVE TO 1976.—(A) IN GENERAL.—The amendments made by subsections (b)(1), (j)(1), and (j)(2) [*amending subsecs. (b)(1), (e)(9), and (g) of this section and section 1040(a), (b) of this title*] *and the provisions of subparagraph (A) of section 2032A(c)(7) of the Internal Revenue Code of 1954 (as added by subsection (c)(2))* shall apply with respect to the estates of decedents dying after December 31, 1976.
>
> (B) TIMELY ELECTION REQUIRED.—Subparagraph (A) shall only apply in the case of an estate if a timely election under section 2032A was made with respect to such estate. *If the estate of any decedent would not qualify under section 2032A of the Internal Revenue Code of 1954 but for the amendments described in subparagraph (A) and the time for making an election under section 2032A with respect to such estate would (but for this sentence) expire after July 28, 1980, the time for making such election shall not expire before the close of February 16, 1982.*

(New language in italics). The changes were made effective as of the original adoption of ERTA in 1981. S. Rep. No. 97-592, 97th Cong. 2d Sess. 22, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4169.

The amendment to ERTA demonstrates that the six month grace period is to apply only to estates not eligible for special use election prior to enactment of ERTA *and* whose time for election would otherwise have expired after July 28, 1980. The second condition that the Commissioner asks us to find by implication in ERTA is made explicit by the Technical Corrections Act. We must determine which version governs the attempted election by McCoy's estate.

The title of the amendment to § 421(k)(5) in the Technical Corrections Act is "Clarification of Effective Dates." The legislative history makes clear that the purpose of the technical corrections is to conform the amended provisions of ERTA to the original intent of Congress. "All amendments made by the bill are meant to carry out the intent of Congress in enacting the original legislation." S. Rep. No. 97-592, 97th Cong. 2nd Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4149. In "Explanation of provisions," the Senate Report, at p. 22, states: "The bill clarifies that the right to make a late initial election or reinstate a previously revoked or disallowed election is available only if one of ERTA's four retroactive amendments applies to the estate." *Id.* at 4169. The retroactive ERTA amendment relied upon by the executor is the amendment to § 2032A(b)(1). However, that amendment was not needed to make the McCoy estate eligible for special use treatment, since the estate was already eligible under the unamended version of § 2032A. Thus the retroactive amendment to § 2032A(b)(1) does not apply to the estate.

The Technical Corrections Act was passed in the second session of the 97th Congress, which had adopted ERTA in its first session. It is settled that subsequent legislation declaring the intent of an earlier statute is entitled to significant consideration. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). This is true even when a later Congress expresses its views of the work of an earlier Con-

gress. *Bell v. New Jersey*, 461 U.S. 773, 784 (1983). In this case the same Congress has explicitly clarified the meaning of legislation adopted the previous year. Where the amendment is adopted to clarify rather than change the meaning of earlier legislation, it should be accorded even greater weight. *Cf In re Adams,* 761 F.2d 1422, 1427 (9th Cir. 1985); *Barnes v. Cohen,* 749 F.2d 1009, 1015 (3d Cir. 1984). See also *Canisius College v. United States,* 799 F.2d 18, 25 (2d Cir. 1986); *Temple University v. United States,* 769 F.2d 126 (3d Cir. 1985) (amendments that retroactively applied changes to earlier statute held constitutional, and applied to defeat claims that would have prevailed under original version).

VI.

We conclude that the statute should be construed to effectuate the clearly stated intent of Congress, even though the language used in ERTA at least pointed in the other direction. The McCoy estate was not deprived of the benefit of special use valuation by any "technical requirements" of § 2032A before amendment. The estate lost this valuable right because it did not make a timely election. Since the stated purpose of the ERTA amendments to § 2032A was to benefit estates that had been barred by technical requirements from making an election, there is no reason to extend the grace period to an estate that was eligible under original § 2032A, but merely failed to follow clearly stated requirements for making an election.

The executor also argues that the estate reinstated its election by filing a second estate tax return on February 9, 1982. He relies on § 421(k)(5)(C) of ERTA, which provides:

> (C) REINSTATEMENT OF ELECTIONS—If any election under section 2032A was revoked before the date of the enactment of this Act, such

> election may be reinstated within 6 months after the date of the enactment of this Act.

Since the McCoy estate failed to take any action that could be construed as a revocation of its first election prior to August 13, 1981, its second filing in 1982 cannot be considered a valid reinstatement under § 421(k)(5)(C).

The decision of the Tax Court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1008

ESTATE OF ARTHUR H. MCCOY, DECEASED
ROBERT MCCOY, EXECUTOR, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

[Filed Jan. 23, 1987]

JUDGMENT

BEFORE: LIVELY, Chief Judge; KEITH and MERRITT, Circuit Judges.

ON APPEAL from a decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of record from the said tax court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said tax court in this cause be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Respondent-Appellee recover from Petitioner-Appellant the costs on

appeal, as itemized below, and that execution therefor issue out of said tax court, if necessary.

Entered by Order of the Court

/s/ JOHN P. HEHMAN,
John P. Hehman, Clerk

A True Copy.

Attest:
/s/ TOM BENNINGAUS
Tom Benningaus, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-1008

ESTATE OF ARTHUR H. MCCOY, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLEE

[Filed Apr. 14, 1987]

ORDER

Upon consideration of the appellee's motion to recall the mandate,

IT is ORDERED that the motion be, and it hereby is, denied.

Entered by Order of the Court

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

APPENDIX E

UNITED STATES TAX COURT

T.C. Memo. 1985-509

Docket No. 19540-83.

ESTATE OF ARTHUR H. MCCOY, DECEASED ROBERT MCCOY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Walter E. Schutt, for the petitioner.
Nancy B. Herbert, for the respondent.

Filed September 26, 1985

MEMORANDUM OPINION

FEATHERSTON,[1] *Judge:* Respondent determined a deficiency in petitioner's estate tax in the amount of $22,159.72. The issue for decision is whether petitioner effectively elected to have the interest of the decedent, Arthur H. McCoy, in certain real property valued under section 2032A[2] as special use property rather than at its full fair market value.

All the facts are stipulated.

[1] By order dated Aug. 29, 1985, this case was reassigned from Judge Herbert L. Chabot.

[2] All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise noted. All ERTA section references are to the Economic Recovery Tax Act of 1981, Pub. L. 97-34, 95 Stat. 312.

Arthur H. McCoy (decedent) died on April 23, 1980, and Robert McCoy, a resident of Ohio when the petition was filed, was appointed executor of decedent's estate. Under section 6075(a), the Federal estate tax return for decedent's estate was due on January 23, 1981, nine months after the date of decedent's death. The estate filed its Federal estate tax return on February 11, 1981, approximately 3 weeks after it was due.

On Schedule A of the Federal estate tax return, Form 706, filed on February 11, 1981, the estate reported that the decedent owned an undivided one-half interest in a parcel of realty and claimed a section 2032A special use valuation for the property in the amount of $103,304.70. On February 9, 1982, the estate submitted a second estate tax return, Form 706, in which a similar claim was made. The parties agree that, if the provisions of section 2032A do not apply, the fair market value of decedent's one-half interest in the real property at this death was $235,139.70.

In the notice of deficiency issued to the estate of April 12, 1983, respondent determined that the estate is not entitled to the benefit of the special use valuation provisions of section 2032A on the ground that "the federal estate tax return with the required election was not timely filed." The issue is, of necessity, a technical one.

For estate tax purposes, real property must ordinarily be included in a decedent's gross estate at its fair market value based upon its highest and best use. If certain requirements are met, however, section 2032A permits family farms and real property used in other closely held businesses to be included at their current use values rather than their fair market values. See generally *Estate of Coon v. Commissioner*, 81 T.C. 602, 608 (1983); *Estate of Geiger v. Commissioner*, 80 T.C. 484, 487 (1983).

In the form in which it was in effect when decedent's estate tax return was due to be filed, section 2032A(d)(1) provided that the election of a special use valuation must

be made "not later than the time prescribed by section 6075(a)" for filing an estate tax return including extensions thereof. Sec. 20.2032A-8(a)(3), Estate Tax Regs. Under the law as it then stood, it is thus clear that the election attempted in the delinquent estate tax return filed February 11, 1981, was not effective,[3] and we do not understand that petitioner contends otherwise.

Petitioner contends, however, that the election attempted in its delinquent estate tax return filed February 11, 1981 (or in its refiled return of February 9, 1982), was effective under section 421(k)(5), ERTA. For the reasons we shall discuss, we do not agree. We do not think the transitional rules of section 421(k)(5), ERTA, apply in petitioner's case because the retroactive changes in section 2032A made by ERTA did not render petitioner eligible to make the election. Petitioner was already eligible to make the election but failed to do so within the period mandated by section 2032A(d)(1) in the form in which it was in effect when petitioner's estate tax return was filed.

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[3] *Estate of Williams v. Commissioner*, T.C. Memo. 1984-178; *Estate of Boyd v. Commissioner*, T.C. Memo. 1983-316; *Teubert v. United States*, an unreported decision, 83-1 USTC par. 13,513, 51 AFTR2d 83-1340 (D. Minn. 1983). Substantially identical language in sec. 2032(c) relating to the election of an alternate valuation date has been similarly interpreted. *Estate of Bradley v. Commissioner*, 511 F.2d 527 (6th Cir. 1975), affg. a Memorandum Opinion of this Court; *Estate of Ryan v. Commissioner*, 62 T.C. 4, 10 (1974). Sec. 421(j)(3), ERTA, amended sec. 2032A(d)(1) to read as follows:

> (1) Election.—The election under this section shall be made on the return of the tax imposed by section 2001. Such election shall be made in such manner as the Secretary shall by regulations prescribe. Such an election, once made, shall be irrevocable.

This amendment permits the sec. 2032A election to be made on a late return as long as the return is the first return filed. This amendment was made effective, however, only with respect to decedents dying after Dec. 31, 1981. Sec. 421(k)(1), ERTA; *Estate of Williams v. Commissioner*, *supra*.

ERTA made numerous changes in the current or special use valuation provisions of section 2032A. Section 421(k), ERTA,[4] provides effective dates for the several amendments. "Except as otherwise provided," section 421(k)(1), ERTA, makes all of the amendments effective with respect to estates of decedents dying after December 31, 1981. Section 421(k)(2), (3), and (4), ERTA, prescribes effective dates for certain amendments which are not here relevant. Section 421(k)(5), ERTA, then prescribes the effective dates for four amendments which were made retroactive for estates of decedents dying after December 31, 1976.

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[4] Sec. 421(k), ERTA, provides as follows:

(k) Effective Dates.—

(1) In general.—Except as otherwise provided in this subsection, the amendments made by this section shall apply with respect to the estates of decedents dying after December 31, 1981.

(2) Increase in limitation.—The amendment made by subsection (a) shall apply with respect to the estates of decedents dying after December 31, 1980.

(3) Subsection (d).—The amendments made by subsection (d) shall apply with respect to exchanges after December 31, 1981.

(4) Subsection (e).—The amendments made by subsection (e) shall apply with respect to involuntary conversions after December 31, 1981.

(5) Certain amendments made retroactive to 1976.—

(A) In general.—The amendments made by subsections (b)(1), (c)(2), (j)(1), and (j)(2) shall apply with respect to the estates of decedents dying after December 31, 1976.

(B) Timely election required.—Subparagraph (A) shall only apply in the case of an estate if a timely election under section 2032A was made with respect to such estate. If the time for making an election under section 2032A with respect to any estate would have otherwise expired after July 28, 1980, the time for making such election shall not expire before the date 6 months after the date of the enactment of this Act.

(C) Reinstatement of elections.—If any election under section 2032A was revoked before the date of the enactment of this Act, such election may be reinstated within 6 months after the date of the enactment of this Act.

(D) Statute of limitations.—If on the date of the enactment of this Act (or at any time within 6 months after such date of enactment) the making of a credit or refund of any overpayment of tax resulting from the amendments described in subparagraph (A) is barred by any law or rule of law, such credit or refund shall nevertheless be made if claim therefor is made before the date 6 months after such date of enactment.

The four retroactive amendments to section 2032A were as follows: (a) a provision that the qualified use requirement may be satisfied during the pre-death period where the trade or business use is that of the decedent or a member of decedent's family (sec. 421(b)(1), ERTA); (b) a provision that property passing to discretionary trusts will be considered in specified circumstances to have satisfied the requirement that specially valued property be acquired from the decedent (sec. 421(c)(1), ERTA); (c) a provision that property purchased from a decedent's estate will satisfy the requirement that specially valued property be acquired from the decedent (sec. 421(j)(1), ERTA); and (d) a provision permitting a 2-year grace period during which the post-death qualified use requirements need not be met (sec. 421(j)(2), ERTA). The stipulated facts do not show that petitioner became qualified to make the section 2032A election as a result of any of these provisions.

Petitioner alleges in the petition that "it qualifies under (b)(1) of the four retroactive provisions of Section 421(k)(5)(A)." On brief, petitioner states that "Arthur McCoy's estate fits precisely within those retroactive situations provided for in (k)(5)(A) of the section, specifically (b)(1) referring to qualified use of the real estate." As indicated above, section 421(b)(1), ERTA, amended section

2032A(b)(1) to provide that the qualified use requirement could be "satisfied if either the decedent or a member of the decedent's family uses real property otherwise eligible for current use valuation in the qualified use." H. Rept. No. 97-215 (1981), 1981-2 C.B. 481, 508. The stipulated facts contain no clue as to whether petitioner did or did not meet this requirement with respect to the disputed property, before or after the enactment of ERTA. The estate tax return filed February 11, 1981, contains the representations that: "Qualified use by the decedent started in each case on the date of acquisition. * * * Until his death there was no time that decedent did not materially participate in the operation of the farmlands from the dates of acquisition." Respondent's reply brief makes the representation that "the estate was entitled to elect the provisions of I.R.C. section 2032A both before and after the enactment of the Economic Recovery Tax Act of 1981." We accept respondent's concession of this point.

Section 421(k)(5), ERTA, headed "Certain amendments made retroactive to 1976," quoted in footnote 4, *supra,* as we read it, was not intended to create a new open season for estates which were previously eligible to, but did not, make timely elections under section 2032A. Instead, it was intended to prescribe the circumstances in which the four amendments were to apply retroactively. Section 421(k)(5)(A), ERTA, identifies the four retroactive amendments and makes them generally effective with respect to estates of decedents dying after December 31, 1976. The first sentence of section 421(k)(5)(B), ERTA, prescribes the general rule that the 1976 effective date will apply only if a timely election was made under section 2032A. The second sentence provides for situations in which the time for making an election "would have otherwise expired after July 28, 1980"; we think this provision, given its context, refers to elections by estates which became eligible to make or reinstate section 2032A elections because of one or more of the four retroactive amendments to which the entire section is addressed. Because petitioner was eligible to make the election prior to the enactment of ERTA, this second sentence is not applicable to petitioner's case.

The foregoing interpretation of section 421(k)(5)(B), ERTA, is confirmed by the following excerpt from H. Rept. No. 97-201 (1981), 1981-2 C.B. 352, 387,[5] explaining the provision as follows:

> Estates for which estate tax returns were due and timely filed before enactment of the bill which are eligible to reinstate (or make) elections *because of these retroactive changes* will be allowed six months from the date of enactment of the bill in which to reinstate current use valuation elections. * * * [Emphasis added.]

Our interpretation of the section is likewise consistent with that found in General Explanation of the Economic Recovery Tax Act of 1981, prepared by the Staff of the Joint Committee on Taxation, p. 253, as follows:

> The Congress believed that four of the changes included in the Act are primarily technical and should be applied retroactively in certain cases as well as to all estates for which estate tax returns are not due to be filed until after the date of enactment of the Act (August 13, 1981). * * *
>
> * * *
>
> These four changes apply to all estates for which estate tax returns are due to be filed after the date of enactment of the Act (August 13, 1981), and also apply retroactively to:

---

[5] The Senate version of sec. 421(k), ERTA, differed from the House version but the Conference agreement followed the House bill. H. Rept. No. 97-215 (1981), 1981-2 C.B. 481, 511.

(a) All estates of decedents dying after December 31, 1976, for which the estate tax return was due and timely filed on or before July 28, 1980, the date on which the final Treasury regulations under section 2032A were adopted, provided that the estate timely elected current use valuation on the decedent's estate tax return (even if the election was subsequently revoked pursuant to Treas. Reg. sec. 20.2032A-8 (d)); and

(b) All estates of decedents for which an estate tax return was due and timely filed after July 28, 1980, and on or before August 13, 1981, whether or not the estate originally elected the current use valuation provision.

Estates for which estate tax returns were due and timely filed before enactment of the Act which are eligible to reinstate (or make) elections because of these retroactive changes must do so on or before the date which is six months after the date of enactment (i.e., February 16, 1982). The elections are to be reinstated by making a claim for refund accompanied by the documentation presently prescribed in Treasury regulations for making a current use valuation election.

Section 421(k)(5)(B), ERTA, thus does not entitle petitioner to the special use valuation of its interest in the disputed realty. Prior to the enactment of ERTA, petitioner was eligible to, but did not, make an effective section 2032A election. Petitioner's February 11, 1981, estate tax return was not timely filed and, for that reason, the attempted section 2032A election made therein was not effective. The four retroactive amendments made by ERTA have not been shown to render petitioner eligible to make a section 2032A election, and, in the words of the House Report (1981-2 C.B. at 387), quoted above, section 421(k)(5), ERTA, was intended to apply only where an

estate is "eligible to reinstate (or make) elections because of these retroactive changes." Accordingly, the effective date provisions on the retroactive amendments contained in section 421(k)(5), ERTA, do not entitle petitioner to the benefit of the current use valuation provisions of section 2032A.[6]

To reflect the foregoing, *Decision will be entered for the respondent.*

---

[6] The refiling of petitioner's original estate tax return on Feb. 9, 1982, does not, in our view, aid petitioner's cause. Petitioner refers to sec. 421(k)(5)(C), ERTA, quoted in n.4, *supra*, which provides that, if an election was "revoked before the date of the enactment of this Act, such election may be reinstated within 6 months after the date of the enactment of this Act" and seems to argue that the refiling of its estate tax return on Feb. 9, 1982, brings petitioner within this provision. There is no evidence that petitioner ever made a valid election that it could revoke or that it ever attempted to revoke an election. We find sec. 421(k)(5)(C), ERTA, inapplicable to the stipulated facts.

APPENDIX F

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 19540-83.

ESTATE OF ARTHUR H. MCCOY, DECEASED
ROBERT MCCOY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

DECISION

Pursuant to the Court's determination, as set forth in its Memorandum Opinion (T.C. Memo. 1985-509), filed September 26, 1985, it is

ORDERED AND DECIDED: That there is a deficiency in the amount of $22,159.72 in petitioner's Federal estate tax.

C. Moxley Featherston
Judge

Entered: Sep. 27, 1985

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40396

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-75

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF ARTHUR H. McCOY, DECEASED,
ROBERT McCOY, EXECUTOR,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the court of appeals has authority, inherent within its judicial power in the particular circumstances of a unique case, to grant a taxpayer's request to forgive interest and penalty on payment of a tax deficiency, given individual circumstances, "in order to achieve a fair and just result."

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No. 87-75

IN THE

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OCTOBER TERM, 1987

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF ARTHUR H. McCOY, DECEASED,
ROBERT McCOY, EXECUTOR,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, the Estate of Arthur H. McCoy, deceased, Robert McCoy, Executor, respectfully prays that this Court deny the petition for a writ of certiorari filed by the Commissioner of Internal Revenue, which seeks review of the order of the United States Court of Appeals for the Sixth Circuit entered on March 2, 1987, forgiving interest and penalty upon payment of a found deficiency in respondent's federal estate tax. The order is set out in the petition's Appendix A, page 1a.

COUNTERSTATEMENT OF THE CASE

I. Preliminary

The petition asks this Court to review the court of appeals' determination that interest and penalties be forgiven on the

tax assessed in this case. This it does on an alleged basis that the court of appeals was without authority to make such a determination, that the decision is unsupportable on the merits, and that it is in conflict with decisions of other appellate courts. *See* page 7 of the petition.

The petition fails to justify a review by this Court. The Sixth Circuit decision was entirely correct in view of the circumstances, and will affect none but the litigants themselves.[1]

II. Nature of the Case.

Arthur H. McCoy died testate on April 23, 1980. His son, Robert McCoy, was appointed executor of his estate. The decedent at his death had been the owner of an undivided one-half interest in his 244 acre family farm in Clinton County, Ohio, at a fair market valuation of $235,139.70. It was stipulated below, however, that respondent estate would have been entitled to special use valuation on a timely filing of its estate tax return. Special use valuation would have been $103,304.70. It was stipulated further that the tax as assessed on a fair market valuation basis would be $22,159.72, but that on special use valuation there would be no tax.

The estate's federal estate tax return with special use valuation attachments, was filed on February 11, 1981, nineteen days after January 23, 1981, when normally it would have been due. The Commissioner of Internal Revenue held from the outset that the filing under 26 U.S.C. Section 2032A(d)(1) and 26 U.S.C. Section 6075 (a)[2] was untimely, as not being

---

[1] The Commissioner asks the Court to review an unpublished order properly issued, as the Sixth Circuit noted, on "the entire record" of this unusual case, "in order to achieve a fair and just result." *See* Petition page 1a, Appendix A.

Pages of the petition are referred to as Pet p. An appendix of the petition is referred to as App.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

within the nine-month period authorized from the decedent's death. This became the single question litigated below.

Respondent's position was that The Economic Recovery Tax Act of 1981 (ERTA), Public Law 97-34, retroactively amended Section 421(k)(5) of 2032A, to permit the otherwise late filing for special use valuation of a family farm such as respondent's.

The pertinent parts of Section 421(k)(5) are these:

> Certain Amendments Made Retroactive to 1976. —
>
> (A) In General. — The amendments made by subsections (b)(1), (c)(2), (j)(1), and (j)(2) shall apply with respect to the estates of decedents dying after December 31, 1976.
>
> (B) Timely Election Required. — Subparagraph (A) shall only apply in the case of an estate if a timely election under section 2032A was made with respect to such estate. *If the time for making an election under section 2032A with respect to any estate would have otherwise expired after July 28, 1980, the time for making such election shall not expire before the date 6 months after the date of the enactment of this Act.* (Emphasis supplied.)
>
> (C) Reinstatement of Elections. — If any election under section 2032A was revoked before the date of the enactment of this Act, such election may be reinstated within 6 months after the date of the enactment of this Act.

See also Court of Appeals Opinion of January 23, 1987, set forth as Appendix B of the petition, at Pages 5a and 6a. Decision, Pet p 16a, App C.

The Commissioner having stipulated that respondent, on a timely election filing, was entitled to benefit from the special use valuation, respondent's interpretation of the second sentence of section (k)(5)(B) was that it opened and expanded

the election time for decedent's estate until six months following the date of ERTA's enactment, which was August 13, 1981. The statute explicitly stated that "any estate" falling within this retroactive class was to be so treated. The overall policy of the Congress, as expressed, was to avoid the harshness in taxation otherwise fastened on such operations as family farms by fair market valuation procedures.

Although the Tax Court rejected this interpretation, it is clear that the court of appeals effectively agreed with respondent, as is evident by the first nine pages of its opinion. Pet pp 3a-11a, App B. Stating that the "precise issue presented" was of first impression before the court, the court noted as well that the evident intention of ERTA was to expand eligibility for special use valuation. Pet p 8a.

Not until the final quarter of its opinion did the Sixth Circuit state its basis for affirming the Tax Court's decision against respondent. Then, the court of appeals resolved that it was constrained to side with the Commissioner by the Technical Corrections Act of 1982, Public Law No. 97-488, 96 Statute 2365 (1983), and its Amendments Related to Section 421, subsection (b)(4)(B), Clarification of Effective Dates. As the Court of Appeals indicated, this was an amendment to an amendment (Pet P 12a, App B), and was "after-the-fact . . . of a stautory provision upon which the petitioner reasonably relied." *See* the court's March 2, 1987 order, Pet P 1a, App. A.

Following the decision of the Tax Court in September, 1985, the Commissioner assessed a deficiency in the estate tax and later issued his notice and demand for payment. *See* Pet p 6. Because respondent took its appeal to the Sixth Circuit, the tax was not then paid.[3]

[3] Respondent did not file a bond to stay assessment and collection. Respondent instead had filed a Form 4768 with the local office of the IRS, with supporting reasons, seeking an extension of time, if needed, within which to pay the tax until December 31, 1986, when it was believed the court of appeals decision would have been given. Moreover, it is to be noted that 26 U.S.C. section 7481 provides that the decision of the Tax Court does not become final until its decision, on appeal, has been affirmed, or a petition for certiorari has been denied.

Pursuing the justification of its position in good faith, and at substantial cost, respondent was required to wait until November, 1986, before being scheduled to argue its appeal. Following oral argument, on January 23, 1987, the Sixth Circuit issued its judgment and opinion affirming the Tax Court. Respondent thereafter paid the tax itself, but petitioned the Court of Appeals to forgive the interest and penalty. In its petition, Respondent emphasized that, as the Sixth Circuit recognized in its opinion, the case was one of first impression, and respondent was the victim of an obscure after-the-fact statutory amendment, the Technical Corrections Act. Respondent further stressed the overburdening handicap that the interest and penalty assessment, exceeding the amount of the tax itself, would impose on the heavily mortgaged family farm in this case. As respondent noted, the assessment would likely force the sale of the farm and thereby defeat one of the very purposes of ERTA, the preservation of just such a property.

The Technical Corrections Act of 1982, (1983), was not referred to in any manner by the Tax Court in its opinion. *See* Pet p 19a, App E. Nor had it ever been referred to by the Commissioner in brief or argument. It was first noted by the court of appeals itself at the last of its opinion. *See* Pet p 11a, App B.[4]

Finally, upon consideration of the entire record and with due recognition of the peculiar circumstances, the Sixth Circuit, on March 2, 1987, entered its order forgiving interest and penalty, "in order to achieve a fair and just result." *See* Pet p 1a, App A.[5]

[4] The language the Technical Corrections Act made in the precise changes to section 421(k)(5)(A)-(B) of ERTA is set out on page 12a, Appendix B, of the petition.

[5] It is to be noted from the record that the court of appeals mandate was

REASONS FOR DENYING THE WRIT

I. There are no Special and Important Reasons in Support of the Petition.

As stated on page 14 of the petition, the March 2, 1987 order of the court of appeals is unpublished. It is not precedent setting, and is not designed to stake out a position at odds with decisions of other courts of appeals. It turns entirely on the stipulated facts and unique circumstances of the case, set forth in its record, over a period of six years. The applicable law has been within its own restricted time frame; it is not likely that another such case now could appear. No consequent floodgates of litigation are apt to open, as implied by the petition (Pet p 14). The Commissioner has cited no other pending cases that could possibly be affected by the order he seeks to have reviewed. *See Laing* v. *United States*, 423 U.S. 161, 167 (1976). The problem is not recurring, nor does the petition suggest that it is.

The Commissioner accuses the Sixth Circuit of an "arrogation of judicial power," Pet p 7. As will be realized, the accusation can have no substance. Stripped of rhetoric, the Commissioner's real complaint is that the Sixth Circuit simply made a mistake. That complaint is unfounded. Even if there were some basis, this Court normally is not involved in merely "correcting error." Because of its own time and the volume of cases it must handle, its review of a case "is discretionary, and depends on numerous factors other than the perceived correctness of the judgment (it is) asked to review." *Ross* v. *Moffitt*, 417 U.S. 600, 616-617 (1974).[6]

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returned to the Tax Court on March 10, 1987. The Commissioner's later petition for rehearing was filed on March 16, 1987, with a motion to recall the mandate. (Cf. petitioner's language in footnote 2, page 7, of petition). Under the Internal Operating procedure of the Sixth Circuit Court of Appeals, paragraph 15.1, issuance of the mandate becomes the means by which the court in normal course relinquishes its jurisdiction.

[6] *See also Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955). " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

II. The Sixth Circuit Had Jurisdiction to Consider the Limited Issue of the Forgiveness of Interest and Penalty, which could not have been Raised in the Tax Court.

The petition asserts on page 7 that "The court of appeal's order is made of whole cloth; it has no basis whatever in law." The assertion is incorrect.

Respondent recognizes and necessarily agrees with section 7482(c), entitled "Powers," of courts of appeal (Pet pp 3 and 7), and agrees with the quotation from *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803). Pet p 7-8. Respondent further agrees that the Tax Court is a court of restricted or limited jurisdiction, as affirmed by those cases cited on pages 8 and 9 of the petition.[7]

But that the court of appeals has full equitable jurisdiction is implied both by section 7482, and by Article III, section II, of the Constitution.[8] Moreover, while this Court has recognized the general rule that consideration normally is not given by an appellate court to issues not raised below, it is not, nor

---

[7] *Continental Equities, Inc.*, v. *Commissioner*, 551 F. 2d 74 (5th Circuit 1977), Pet p 9, states its restrictions well. It is a "legislative court," not possessing those full judicial powers vested in "constitutional courts." It is specialized, having grown out of being an "independent agency of the Executive Branch." It has not been given jurisdiction over equitable claims, unlike a court of appeals.

In *Morse* v. *United States*, 494 F. 2d 876 (9th Circuit 1974), cited also on page 9, it is interesting to note that a decision of the Tax Court could not bar, on grounds of res judicata, the district court from later deciding those very issues which the Tax Court was without jurisdiction to determine.

Finally, in *Estate of Baumgardner* v. *Commissioner*, 85 TC 445 (1985), also cited on page 9, the Tax Court nevertheless felt itself called upon (for the sake of justice), to make a determination as between that which was interest and that which was tax in the case, in order to calculate the full extent of an overpayment made by the taxpayer.

[8] Article III, section II, of the Constitution: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . ."

can it be, a rigid rule. As stated by Mr. Justice Black in *Hormel* v. *Helvering*, 312 U.S. 556-559 (1941):

> . . . But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law "as justice may require." There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. . . .
>
> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

And in noting that the Court has been careful in those particular cases to point out the circumstances justifying departure from the general rule, the opinion effectively restates that,

> . . . These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. . . . Whether articulated or not, the philosophy underlying the exceptions to the general practice is in accord with the statutory authority given to courts reviewing decisions of the Board of Tax Appeals.

In 1976 this Court then followed that position in *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976). In his opinion for the Court Mr. Justice Blackmun stated:

> "The Matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal, to be exercised on the facts of individual cases. . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is in doubt."

There are several decisions of courts of appeals so holding. Consistently, the Fifth Circuit has recognized its inherent power, in reviewing a decision by the Tax Court, to pass on issues not addressed by the Tax Court. *See Parker* v. *Commissioner*, 724 F. 2d 469, 472 (5th Circuit 1984). Other courts of appeals in a variety of cases have also confirmed their power. *See*, e.g., *Quinn* v. *Robinson*, 783 F. 2d 776, 814 (9th Cir. 1986); *Olson* v. *Superior Pontiac*, 776 F. 2d 265, 267 (11th Cir. 1985).

As for any violation of the "Anti-Injunction Act" posed by the petitioner (Pet pp 10, 11), there was no such violation here, nor could there have been. The statute (Section 7421(a)) states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . ." Respondent's petition for forgiveness of interest and penalty can in no way be construed as such a prohibitive suit. The petition for forgiveness followed an appropriate challenge by respondent in the Tax Court of a deficiency found by the Commissioner. Respondent's appeal to the Sixth Circuit — of which the petition for forgiveness was the final act — was respondent's statutory means of appealing the validity, and finally the amount of tax, interest and penalties.

It is submitted that "as justice may require," under section 7482(c), the court of appeals has full constitutional and statutory power to determine issues not raised in the court below, as the circumstances of the given case impel.

This, the court of appeals did.

Contrary to petitioner's earlier statement, the court of appeals has had its basis and its power from its inception.

III. The Sixth Circuit's Order is Wholly Supportable on the Merits.

The March 2, 1987 order of the Sixth Circuit was a well considered appellate response to the peculiar facts of this case, stipulated and set forth in the record, as that record makes clear based upon section 421(k)(5)(A)-(B) of the Code. Given the fluctuating language of ERTA, the position and pursuit of respondent were found reasonable by the court of appeals. In its March 2, 1987 order, the court states that its affirmance of the Tax Court's decision "was based solely on an after-the-fact amendment of a statutory provision upon which the petitioner reasonably relied." And upon consideration of "the entire record" it was concluded "that interest and penalty should be forgiven . . . in order to achieve a fair and just result."

The waiver of the late payment penalty by the court of appeals was eminently proper, under the circumstances. The Commissioner has urged that Section 6651 required respondent to pay the deficiency within ten days of service of the Commissioner's notice and demand, following the Tax Court's decision, and that failure to do so unavoidably subjected respondent to the penalty. But the added tax by way of penalty for "failure" to pay set forth in the statute is mitigated by the statute's own language. That language, set forth in sec. 6651, as quoted on page 2 of the petition, requires the payment to be made within the ten day period "unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . .".

This litigation has been in progress since the autumn of 1981 on its start, first, through the required channels of the Internal Revenue Service. Pursuing its interpretation of the

ERTA sections above, and its position, respondent has had no control over the six year time period it has taken to reach this level. Yet, feeling its justification and its right, and being aware of the very purpose of the enactment of ERTA, the pursuit was continued. It is submitted that respondent, far from being willfully negligent, has had reasonable cause indeed not to pay the assessed tax until the court of appeals decision was made.

With regard to interest, a number of cases establish the power in the courts to determine the applicability of interest in given cases, based upon their own fact situations and the justice of result. Courts may refuse to enforce payment of interest imposed in such cases.

In *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475 (1937), involving a statutory predecessor to section 6601, relied on by the government, the petitioner had brought an action against the government on designated contracts in six figures. The govenment counterclaimed in six figures for a deficiency in income and excess-profits taxes. The court below found the government owed petitioner, in round numbers, $119,000, while the latter's tax liability was $82,000. The court below, however, based on the prior statute, had allowed interest on the tax from date of assessment in sum of $58,000, bringing the total over 12 years to more than $140,000. The government's indebtedness to petitioner had occurred in 1924. At that time, had there been an adjustment between the parties as between debt and tax, the petitioner would have gained a balance payment. This Court, speaking through Mr. Justice Sutherland, stated, "The inequity of allowing the government interest for twelve years under these circumstances, so as to bring the petitioner in debt to the government in the sum of over $21,000, is so gross as to be shocking." The Court effectively forgave the interest.[9]

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[9] It is true that the Court formally based its forgiveness on the Commissioner's apparent failure, years before, to have issued a notice and demand

It is not unlike our case at bar, in which interest and penalties, if allowed, would more than double the tax assessed itself. And this, for the pursuit of respondent's case through its time period, barred finally by an intervening technicality. See Pet pp 1a and 11a-12a, Apps. A and B.

The Court in its opinion in the *American Propeller* case stated further: "The reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest." 300 U.S. at 478.[10]

The government is wrong in stating that the "interest requirement" is absolute (Pet p 12), and that "the courts of appeals have uniformly rejected the idea that a taxpayer can be relieved of his obligation to pay interest on a tax deficiency . . ." (Pet p 12). Moreover, if in normal course interest charged is to "compensate the government for delay in payment . . .," as the government asserts, then in the case at bar,

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for payment of deficiency in timely manner and in proper fashion. It is clear from its opinion, however, that this Court, through an exhaustive review of the record, employed the technicality as a means for working equity and justice.

[10] *See also* the following state cases interpreting interest statutes analogous to section 6601:

Meyers v. *Arcadia Realty Foundation, Inc.*, Kentucky Court of Appeals, 367 S.W. 2d 836, 837 (1963). "The crucial question is whether a court of equity can excuse a taxpayer from paying the penalties and interest imposed . . . upon a determination that the taxpayer believed in good faith that he was not liable for the taxes assessed against him. . . . this Court . . . has specifically held that the good faith of the taxpayer could be considered in determining whether he should be relieved of such penalties and interest."

And *Morrison-Knudson Co., Inc.*, v. *State Board*, 58 Wyo. 500 (1943), 135 P. 2d 927, 939: "Payment of interest is in the nature of a penalty . . . though treated separately by the statute. It is assessed on account of default or delay." And, "Equitable considerations will not be entirely disregarded even in tax cases."

Others: *Smith* v. *Pullman, Inc.*, 280 Ala. 2d 516 (1967), 193 So. 2d 516; *Holiday Inns* v. *Tully, Assessor*, 106 In. App. 3d 1004 (1982), 436 N.E. 2d 592.

if penalty and interest are allowed, the government effectively is achieving an excess-profit. Again, as the ultimate result of a nineteen day hiatus in filing time, while the government otherwise would have received *no* tax, it now has recovered a full tax, and would gain more than double that tax through penalty and interest, if allowed to be charged. In view of the legitimate pursuit of respondent's suit, this would be a high and unconscionable cost indeed to pay for the right to pursue it.

Within the framework of the law, it is for the courts to determine whether given circumstances are of such a nature that the resulting justice or injustice of the cause's decision must control that decision. This is of the judicial function, prerogative, and duty.

CONCLUSION

The petition for a writ of certiorari should be denied, and the March 2, 1987 order of the court of appeals should be affirmed. No purpose would be served by a plenary review of this case.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
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No. 87-75

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF ARTHUR H. MCCOY, DECEASED,
ROBERT MCCOY, EXECUTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER

We have argued in our petition that the court of appeals' decision forgiving interest and the late-payment penalty "in order to achieve a fair and just result" (Pet. App. 1a) is wholly indefensible on two distinct grounds. First, the court of appeals exceeded its authority in ruling on these matters because they were not before the Tax Court and hence were not within the Sixth Circuit's appellate jurisdiction. Second, the interest and penalty were both imposed pursuant to unambiguous statutory provisions, and the

court of appeals erred in forgiving them on grounds not authorized by Congress. In light of respondent's brief in opposition, it is appropriate to make a few additional comments.

1. Respondent attempts to defend the court of appeals' unprecedented decision to forgive the statutory late-payment penalty on the ground that the estate's failure to pay the assessed tax was " 'due to reasonable cause.' " Br. in Opp. 10-11 (quoting I.R.C. § 6651(a)(3)). As we noted in our petition (at 9-11), the court of appeals lacked jurisdiction to consider the propriety of the Section 6651 penalty. The court of appeals, moreover, was in no position to make a finding of "reasonable cause" (Pet. 12-13) and did not purport to do so; indeed, the words "reasonable cause" do not appear in its opinion. See Pet. App. 1a-2a. Even putting these defects aside, however, respondent's attempted defense of the merits of the court of appeals' order is wholly without foundation.

In essence, respondent argues that it was acting in good faith in appealing the Tax Court's adverse decision on the estate tax question, and that its good-faith prosecution of the appeal excused it from having to pay the tax until all appellate proceedings were concluded. A good faith disagreement about the correct tax treatment, of course, may suffice to negate the conclusion that a taxpayer was negligent and hence insulate him from the negligence penalty imposed by Section 6653(a). See, *e.g.*, *Dillin* v. *Commissioner*, 56 T.C. 228, 248 (1971). But such a disagreement does not provide "reasonable cause," within the meaning of Section 6651(a), for failure to *pay* an assessed tax. The relevant regulation provides (Treas. Reg. § 301.6651-1(c)(1)): "A failure to

pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship * * * if he paid on the due date." Respondent does not state that it was unable to pay or that timely payment would have resulted in "undue hardship," and the court of appeals clearly made no such findings (see Pet. App. 1a-2a). Thus, respondent's failure to pay the assessed tax was not "due to reasonable cause," and respondent was liable for the late-payment penalty as a matter of law.

As we noted in our petition (at 9-10 n.4), the Internal Revenue Code provides that a taxpayer in certain circumstances may avoid paying a tax deficiency pending the outcome of an appeal from an adverse Tax Court decision; under Section 7485, the taxpayer may postpone assessment of the tax in question by filing an appeal bond. Respondent, however, chose not to exercise that option.[1] The tax

[1] Respondent concedes (Br. in Opp. 4 n.3) that it did not file an appeal bond to stay assessment and collection of the estate tax, stating that it chose instead to ask the IRS for an extension of time "until December 31, 1986," to pay the tax. But the mere pendency of an appeal obviously provided respondent with no basis to expect the IRS to grant such an extension. Moreover, even if the requested extension had been granted, respondent would still have been liable for the late-payment penalty, since respondent had requested an extension only until December 31, 1986, but did not pay the tax until after the Sixth Circuit issued its decision affirming the Tax Court on January 23, 1987. Respondent also implies (*id.* at 4-5 n.3) that its failure to pay the assessed tax was justifiable

accordingly was assessed and, when respondent declined to make payment, the estate became liable for the late-payment penalty of Section 6651. The court of appeals' decision to "forgive" this penalty eviscerates the "reasonable cause" language of Section 6651 and completely eliminates the statutory requirement of an appeal bond. Contrary to respondent's assertion, moreover, the court's decision in this regard does not at all turn upon "the stipulated facts and unique circumstances of [this] case" (see Br. in Opp. 6). Rather, the logic of the decision would excuse any taxpayer from paying assessed taxes that are due and payable until all avenues of appeal have been exhausted, and thus it could encourage protracted litigation (see Pet. 14).

2. Respondent's effort to defend the court of appeals' decision to forgive the imposition of interest (Br. in Opp. 11-13) is equally unavailing. As we explained in our petition (at 11-12), Section 6601(a) states that interest "shall be paid" on overdue taxes, and the statute plainly makes no provision for interest to be "forgiven" in order to furtner some vague principle of equity. Cf. *West Virginia* v. *United States*, No. 85-937 (Jan. 13, 1987), slip op. 5 n.3, 7-8

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because the Tax Court's decision, which was then on appeal, had not yet become final. It is true that the Tax Court decision was not yet "final" (and, indeed, it is not yet final) by reason of the special finality definition set forth in Section 7481(a) of the Code. Respondent's attempt to justify non-payment on that basis, however, runs afoul of Section 7485 of the Code, which requires, as a precondition to a stay of assessment and collection, the filing of an appeal bond, "[n]otwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies." As we have noted, no such bond was filed here.

(holding that award of prejudgment interest in favor of the United States does not depend upon "a balancing of equities between the parties").[2]

Moreover, even if Section 6601(a) did permit exceptions on equitable grounds, respondent would not be an obvious candidate for such relief. It is undisputed that respondent neglected to comply with the applicable time limits for electing special-use valuation, and hence that the estate substantially underpaid its estate tax when it filed its return. Respondent's pursuit of this litigation has been based entirely on the claim that a subsequent enactment by Congress had the effect of curing retroactively respondent's failure to make a timely election. That claim has been rejected by every court that has considered it, and there is no reason why respondent should be relieved of its statutory duty to pay interest on the unpaid tax; equity does not require the government to give taxpayers an interest-free loan while they pursue protracted and unsuccessful litigation.[3]

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[2] We stated in our petition (at 12) that "the courts of appeals have uniformly rejected the idea that a taxpayer can be relieved of his obligation to pay interest on a tax deficiency because of supposed equitable considerations." Although respondent asserts that this statement "is wrong" (Br. in Opp. 12), respondent offers no evidence to support its assertion, and it cites no case, apart from the decision below, in which a court of appeals has forgiven interest on a tax deficiency for equitable reasons.

[3] Respondent's reliance (Br. in Opp. 11-12) on *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475 (1937), is misplaced. The law in effect when that case was decided provided that interest was due only when a tax remained unpaid "for ten days after notice and demand by the collector." Revenue Act of 1918, ch. 18, § 250(e), 40 Stat. 1083 (quoted in 300 U.S. at 477 n.1). This Court, citing the ab-

3. Respondent cites several cases, notably *Hormel* v. *Helvering*, 312 U.S. 552 (1941), to support its contention (Br. in Opp. 7-10) that the court of appeals could exercise jurisdiction to forgive the interest and penalty even though the Tax Court decision under review did not address and could not have addressed those questions. As we explained in our petition (at 8 n.3), however, cases like *Hormel* v. *Helvering*, *supra*, are addressed to the situation where a litigant seeks to raise a new argument on appeal to support its contention that the lower court was either correct or incorrect in reaching the judgment that it reached.[4] For prudential reasons, appellate courts are usually reluctant to consider such new arguments, but they do have the power to do so if they determine that the interests of justice would be served thereby.

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sence of any evidence in the record that the collector had given notice and made demand for the tax, concluded that "[Section] 250(e) in the particular under consideration was not complied with" and hence that no interest was payable (300 U.S. at 478-480). The Court noted that this result was also supported by the conceded inequity of the government's position (*id.* at 478, 480)—namely, that it was trying to collect interest for a period in which a net debt ran from the government to the taxpayer—but the Court did not hold that equitable considerations could overcome an unqualified statutory requirement that interest be paid. Rather, the Court stated that equitable considerations counseled against affirming the interest award unless interest was due "under plain compulsion of law" (*id.* at 478). As we have noted, the Court went on to hold that interest was not due under the law as it then stood.

[4] For example, the Court in *Hormel* approved an appellate court's consideration of a new theory justifying the taxation of certain trust income. The question resolved by the appellate court, however—the taxability of that income—was the same as that passed upon by the trial court.

In this case, however, the Sixth Circuit did not address a new argument relevant to the subject matter of the dispute in the Tax Court; rather, the court of appeals decided an entirely different pair of claims that had no effect on the Tax Court's judgment at all. Respondent concedes that the interest and penalty issues were not raised and "could not have been raised in the Tax Court" (Br. in Opp. 7), and the court of appeals affirmed the Tax Court with respect to the only issue that was before it. For the court of appeals to have addressed the entirely separate issues of interest and penalty was outside the scope of its appellate jurisdiction. Rather, those matters should have been raised by respondent in a trial court by means of a refund suit.

For the reasons stated above, as well as those stated in our petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and that the March 2, 1987, order of the court of appeals should be summarily reversed.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

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OPINION

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

COMMISSIONER OF INTERNAL REVENUE *v.* ROBERT McCOY, EXECUTOR OF THE ESTATE OF ARTHUR H. McCOY, DECEASED

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87–75. Decided October 19, 1987

PER CURIAM.

In this case, we are asked to determine whether the United States Court of Appeals exceeded its jurisdictional authority when, after affirming a decision of the United States Tax Court, it granted the taxpayer-estate's request to forgive interest on the determined deficiency in estate tax and also to forgive a statutorily imposed late-payment penalty. We are constrained to hold that the Court of Appeals did exceed its authority.

I

Arthur H. McCoy died testate on April 23, 1980. His son, Robert McCoy, the respondent here, was appointed executor of his will. At his death, the decedent was the owner of an undivided interest in a family farm in Clinton County, Ohio. The then fair market value of that interest was $235,140. Under § 2032A of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 2032A (1982 ed. and Supp. III), however, an estate may elect a special method for valuing certain real property for federal estate tax purposes. This alternative usually is elected if it produces a lower valuation and a lower tax. At the time relevant for the McCoy estate, the election was available only if the land in question was "qualified real property," see § 2032A(b)(1), and only if the election was made "not later than the time prescribed by section 6075(a) for filing the [estate tax] return . . . (including exten-

sions thereof) . . . ." 26 U. S. C. §§ 2032A(d)(1) (1976 ed.). Since § 6075(a) provided that the return was to be filed within nine months of the decedent's death, and since no extension of time was obtained, respondent was required to make any election under § 2032A not later than January 23, 1981.

Respondent, however, did not file the return for the decedent's estate until February 11. In the return, the election as to the interest in the farm—which, it is conceded, would have been "qualified real property"—was asserted. The Commissioner of Internal Revenue, however, took the position that the election was untimely under §§ 2032A and 6075(a), and that the farm interest therefore was to be valued at the date-of-death figure of $235,140, rather than at the special-use figure of $103,304.70 claimed in the return as filed. The lower value would have produced no tax. The Commissioner, using the higher value, determined a deficiency in estate tax of $22,159.72.

Respondent sought redetermination of the asserted deficiency in the United States Tax Court. He contended that the time for making the election under § 2032A had been extended retroactively by amendments to the statute effected by the Economic Recovery Tax Act of 1981, Pub. L. 97–34, § 421(k)(5), 95 Stat. 314.

The Tax Court rejected respondent's contention and sustained the deficiency. 50 TCM 1194 (1985); ¶ 85,509 P–H Memo TC. The Court of Appeals affirmed. 809 F. 2d 333 (CA6 1987). After the Tax Court's decision, respondent did not file the appeal bond required by § 7485 of the Code, 26 U. S. C. § 7485, if assessment and collection of the deficiency were to be stayed. Despite the pendency of the appeal to the Sixth Circuit, the Commissioner therefore assessed the deficiency and issued a notice and demand for payment. When the deficiency was not paid within 10 days, an addition to tax accrued under § 6651(a)(3) of the Code, 26 U. S. C. § 6651(a)(3). Shortly after the Court of Appeals issued its affirming opinion, respondent paid the tax but filed a petition

with the Court of Appeals asking that that court "forgive" interest on the assessment and also the late-payment penalty. Respondent asserted that the case was one of first impression and that the estate would otherwise be the victim of an obscure after-the-fact statutory amendment. Respondent also claimed that it had litigated in good faith the validity of its § 2032A election.

The Court of Appeals on March 2, 1987, entered an order granting the relief requested by respondent's petition. App. to Pet. for Cert. 1a. It noted that "the interest and penalties now exceed the assessed tax," and it concluded that the interest and penalties should be forgiven "in order to achieve a fair and just result." *Ibid.* The Commissioner seeks a writ of certiorari.

II

Under § 7482(a) of the Code, 26 U. S. C. § 7482(a), the regional Federal Courts of Appeals have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Section 7482(c)(1) provides that "such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court." It follows that in reviewing a Tax Court decision, the duty of the Court of Appeals is to consider whether the Tax Court committed error. Plainly, the Court of Appeals lacks jurisdiction to decide an issue that was not the subject of the Tax Court proceeding or to grant relief that is beyond the powers of the Tax Court itself. *Taylor* v. *Commissioner*, 258 F. 2d 89, 91 (CA2 1958); *Vandenberge* v. *Commissioner*, 147 F. 2d 167, 168 (CA5), cert. denied, 325 U. S. 875 (1945). See *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418 (1943). But cf. *Hormel* v. *Helvering*, 312 U. S. 552 (1941); *Singleton* v. *Wulff*, 428 U. S. 106, 120–121 (1976).

The Court of Appeals in this case clearly exceeded its jurisdictional bounds. Its only jurisdiction, under § 7482(a), was

"to review the decisio[n] of the Tax Court." The latter court's decision was that "there is a deficiency in the amount of $22,159.72 in [respondent's] Federal estate tax." App. to Pet. for Cert. 28a. The Court of Appeals ruled that that decision was correct. Its duty, then, was to affirm the decision. It was not empowered to proceed further to decide other questions relating to interest and penalty—questions that were not presented, and could not possibly have been presented, to the Tax Court—or to grant relief that the Tax Court itself had no jurisdiction to provide.

Interest on a tax deficiency is separately mandated by § 6601(a) of the Code, 26 U. S. C. § 6601(a). A penalty that accrues under § 6651(a)(3) is also separate and outside the scope of the petition to the Tax Court. The deficiency asserted here was not assessed, and could not have been assessed, until after the Tax Court had rendered its decision. See § 6213(a). The Tax Court is a court of limited jurisdiction and lacks general equitable powers. *Commissioner* v. *Gooch Milling & Elevator Co.*, *supra*.

The estate, of course, was not without an opportunity to litigate the validity of the interest and the late-payment penalty. The proper procedure was for respondent to pay the interest and penalty and sue for their refund in an appropriate Federal District Court or in the Claims Court. The Sixth Circuit in the former case, and the Federal Circuit in the latter, then would have had jurisdiction to consider those issues on appeal.

We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.

Certiorari is therefore granted and the order of March 2, 1987, is reversed.

It is so ordered.

OPINION

(5)

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-75. Decided October 19, 1987

JUSTICE MARSHALL, dissenting.

I continue to be troubled by this Court's willingness to dispose of appeals and petitions for certiorari through summary *per curiam* opinions, without the benefit of briefing on the merits or review of the full record of proceedings below. I have elaborated this view before, see *Montana* v. *Hall*, 481 U. S. ——, —— n. 1 (1987) (MARSHALL, J., dissenting), as have other Justices of this Court, see *id.*, at —— n. 2, but the admonition bears repeating.

My doubts about summary dispositions encompass concerns about both the parties who seek our review and the integrity, perceived and actual, of our proceedings. The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking redress in this Court and deprives them of any opportunity to argue the merits of their claims before judgment. Moreover, briefing on the merits should be encouraged not only because parties expect and deserve it, but because it leads to greater accuracy in our decisions. Briefing helps this Court to reduce as much as possible the inevitable incidence of error and confusion in our opinions each Term. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

I adhere to the view that whenever the Court contemplates a summary disposition, it should review the full record below and invite the parties to file supplemental briefs on the merits if they wish. I remain unconvinced that this slight modification of our practice would unduly burden the Court. The benefits of increasing the fairness and accuracy of our decisionmaking and the value of according greater respect to our colleagues on this and other courts more than justify these modest accommodations.